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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 601.

M. HAMPTON MAGRUDER, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

v.

WASHINGTON, BALTIMORE AND ANNAPOLIS REALTY CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

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AMBLER H. MOSS,
Counsel for the Respondent.

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OPINIONS BELOW.

The opinion of the District Court (R. 111-116) is reported at 35 F. Supp. 340. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 123-127), affirming the decision of the District Court, is reported at 120 F. (2d) 441.

JURISDICTION.

The judgment below was entered June 11, 1941 (R. 128). The petition for a writ of certiorari was filed September 10, 1941, and was granted October 27, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The sole question presented is whether the courts below were correct in holding that the taxpayer, a corporation engaged in liquidating its assets, was not "carrying on or doing business" within the meaning of the applicable revenue statutes imposing the capital stock tax.

STATUTES AND REGULATIONS INVOLVED.

The pertinent portions of the applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 33-36.

STATEMENT OF FACTS.

The facts are simple and not in dispute. The Respondent Corporation was organized on September 30, 1935, by a protective committee of bondholders of the Washington, Baltimore and Annapolis Electric Railroad Company (R. 117). The purpose of forming the Corporation was for convenience in holding certain properties formerly owned by the Railroad Company, then in receivership, and, as the District Court found as a fact, "to liquidate them in an orderly manner, and to distribute their avails" to Respondent's stockholders, who were the former bondholders of the defunct Railroad Company (R. 118).

The District Court also found that the activities of the Corporation have consisted solely of "owning the properties above referred to, and selling them from time to

time, or making rentals under short term leases (cancellable on short notice, R. 106); paying taxes, insurance premiums, and other expenses incident to such ownership; paying the salaries of its officers (three in number, a President, Vice-President, and Secretary-Treasurer) which were at all times nominal, except on one occasion when additional compensation in the nature of bonuses was paid in connection with extensive sales; paying attorneys' fees and dividends". (R. 118).

The Respondent had no office of its own, and had no one in its regular employ except the three officers and an auditor, who were paid nominal annual salaries (R. 118).

All net proceeds, except small reserves for contingencies, were passed over to the stockholders as received. The total amount paid them by December 31, 1939, was $75.00 per share. Respondent's funds were never "reinvested or otherwise employed for profit". (R. 119). Such rents as were received from short term cancellable leases were at all times less than allocable carrying charges (R. 98). "All of Respondent's activities have been directed toward the prompt liquidation of its assets, which was materially accomplished during the four taxable years in question." (R. 119). The Secretary of the Corporation testified, "The Company was very anxious to get rid of all its property as quickly as possible in the same way the bondholders' protective committee had been doing. What we wanted to do was to sell and distribute and get out." (R. 94).

For the years ending June 30, 1936, through June 30, 1939, Respondent paid capital stock taxes of $6,000.00, $5,985.00, $3,000.00 and $3,005.00, respectively (R. 119). In a suit for the refund of these taxes the District Court held Respondent was not carrying on or doing business within the meaning of the applicable revenue statutes and that,

therefore, said taxes had been erroneously collected (R. 111-119). The Circuit Court of Appeals for the Fourth Circuit affirmed (R. 123-127).

OUTLINE OF ARGUMENT.

The two lower courts should be affirmed. The capital stock tax is an excise tax on a certain type of activity carried on by corporations and is not a tax on the privilege of using the corporate form as such; nor is it a property tax on the mere holding of property; hence, the only inquiry is as to what the Respondent did and not what its charter permitted.

The sole issue before this Court, therefore, as it was before the two lower courts, is whether Respondent Corporation was or was not "carrying on or doing business". This criterion is definite and familiar; many cases in this and lower Federal courts have set up a consistent and clearly understandable frame of reference which plainly excludes the limited activities of this Corporation, whether considered as a broad concept or in the microscopic matching of factual mosaic. This concept, reduced to its essence, involves the hope implicit in retaining and continuing to turn over assets or services for commercial gain. These assets used as a railroad had become unprofitable for years before the foreclosure, but the business was maintained as a going concern in the hope of better things; the foreclosure constituted formal renunciation of any further attempt to use the assets to carry on or do business. The Respondent Corporation was formed because of mechanical convenience in handling title to real estate vested in a large number of individuals; its sole object and its sole activity was to dispose of dead assets and distribute the "avails"—and not to keep, turn over, and employ live capital to earn money thereon. A corporation can use its

assets to "do business" or can liquidate them, but as to the same assets the functions are obviously mutually exclusive.

The Treasury regulations are only incidentally involved; moreover, two separate paragraphs thereof, both of which apply to Respondent, squarely contradict each other. The two courts below properly held that the regulations do not preclude a judicial determination of this case on these facts and followed the uniform and long standing judicial formulation of the concept of "carrying on or doing business". Both the judicial and the partisan interpretations have survived many silent re-enactments of the law, so that in this case there can be no application of the rule that re-enactments adopt administrative or judicial interpretations "with the force of law"; at best, however, that rule is persuasive or not, even in a proper case, depending on the realistic question of fact as to the true intention of the Congress.

ARGUMENT.

I.

THE RESPONDENT WAS NOT "CARRYING ON OR DOING BUSINESS" WITHIN THE MEANING OF THE APPLICABLE REVENUE ACTS.

A. History and Nature of the Tax.

Federal excise taxes on the privilege of "carrying on or doing business" have been in effect from time to time since 1909, when the original so-called "corporation tax" was enacted.* All the acts have defined the privilege on which

* Act of August 5, 1909, Sec. 38, (c. 6, 36 Stat. 11, 112), Revenue Act of 1916, Sec. 407 (c. 463, 39 Stat. 789), Revenue Act of 1918, Sec. 1000 (c. 18, 40 Stat. 1126), Revenue Act of 1921, Sec. 1000 (c. 136, 42 Stat. 294), Revenue Act of 1924, Sec. 700 (c. 234, 43 Stat. 325), National Industrial Recovery Act, Sec. 215 (c. 90, 48 Stat. 207), Revenue Act of 1934, Sec. 701 (c. 277, 48 Stat. 680), Revenue Act of 1935, Sec. 105 (c. 829, 49 Stat. 1017), Revenue Act of 1936, Sec. 401 (c. 690, 49 Stat. 1733), and Revenue Act of 1938, Sec. 601 (c. 289, 52 Stat. 565). The statutory provisions which are pertinent in this case are identical, and will be referred to for convenience as now set forth in I. R. C., Sec. 1200.

this excise tax has been imposed as that of "carrying on or doing business", so that the interpretation of this term under prior acts would be controlling in the instant case, where the phrase in question is identical.

The Treasury in its brief (p. 25), for the first time in the litigation of this case, suggests there is some significance in the omission of the words "organized for profit" in the 1918 and subsequent capital stock tax statutes, although it admits that the legislative history of the act does not reveal any reference to or explanation of the elimination of these words. All of the numerous cases decided since 1918 have applied the principles established by the prior decisions of this Court, including *Edwards v. Chile Copper Company*, 270 U. S. 452, in which both the 1916 and 1918 acts were considered. Mr. Justice HOLMES stated in the opinion in that case (p. 455), referring to both the 1916 and 1918 acts, and citing the former decisions of this Court, that the exemption from the tax would apply when a corporation was "not pursuing the ends for which the corporation was organized, *in the cases where the end is profit*". (Italics supplied.) It is submitted that the words "organized for profit" were eliminated for the simple reason that this Court had decided on numerous occasions that the incidence of the tax should be determined not by what a corporation is *organized* to do, but what it is actually doing during the taxable year. *McCoach v. Minehill & S. H. R. Company*, 228 U. S. 295; *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503. It follows that the question of whether liability exists is the same under all the statutes.

Furthermore, this Court's decision in *United States v. Emery, Bird, Thayer Realty Co., supra*, is a complete answer to the Treasury's argument that taxability necessarily follows the performance of the corporate purpose, without

more, for this Court there held *not* taxable a corporation which was carrying out every purpose of its organization. As stated in *Lane Timber Co. v. Hynson*, 4 F. (2d) 666 (C. C. A. 5), "If a corporation is not engaged in business, it cannot make any difference that what it is doing is authorized by its charter." The reason for the rule is "that the tax is imposed not upon the franchises of the Corporation irrespective of their use in business, nor upon the property of the Corporation, but upon the doing of corporate * * * business and with respect to the carrying on thereof * * *." *Flint v. Stone Tracy Co.*, 220 U. S. 107, 145; *McCoach v. Minehill & S. H. R. Co.*, *supra*, 305.

A reference to the decisions of this Court construing these statutes shows that there is a vital distinction between the kinds of "business" done by corporations; that one kind is taxable and the other is not; and this for the reason that this excise tax, if applied without regard to this distinction, would become as to one kind of "business" in reality not an excise tax but a direct tax on the ownership of property, which this Court has specifically held this excise tax not to be. In *United States v. Whitridge*, 231 U. S. 144, 147, Mr. Justice PITNEY, in the opinion of the Court, shows the genesis of the 1909 tax and the reason for the distinction in the following language:

> "As repeatedly pointed out by this Court, the corporation tax law of 1909—enacted, as it was, after Congress had proposed to the legislatures of the several states the adoption of the 16th Amendment to the Constitution, but before the ratification of that Amendment—imposed an excise or privilege tax, and not in any sense a tax upon property or upon income merely as income. It was enacted in view of the decision of this Court in Pollock v. Farmers' Loan and T. Co., 157 U. S. 429, 158 U. S. 601, which held the income tax provisions of a previous law (act of August 27, 1894) to be unconstitutional because amounting in effect to

a direct tax on property within the meaning of the Constitution, and because not apportioned in the manner required by that instrument."

This Court accordingly decided that a corporation was not liable for the tax where its activities

> "* * * amount to no more than receiving the ordinary fruits that arise from the ownership of property."
>
> *McCoach v. Minehill & S. H. R. Company, supra*, 306.

The important principle which may be deduced from all the decisions is that "carrying on or doing business" depends upon the pursuit of profit through the dedication of capital to a commercial enterprise. The determining factor concerning which inquiry must be made is the *purpose* for which the activities of a corporation are carried on, as transactions not entered into for the purpose of earning profits do not constitute the carrying on of, or engaging in business.

The Circuit Court of Appeals below, referring to an earlier case decided by it,* said (R. 126):

> "There we reviewed the authorities and held that very slight activity constitutes "doing business" when the end is profit. There does not necessarily have to be a profit made, the result of doing business may be a loss, but the end sought must be to make a profit."

This Court has broadly defined the applicable rule in *Von Baumbach v. Sargent Land Co., supra*, 516:

> "It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consid-

* *United States v. Atlantic Coast Line Co.*, 99 F. (2d) 6, (opinion revised, *United States v. Atlantic Coast Line Co.*, 99 F. (2d) 932), certiorari denied, 306 U. S. 645.

eration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain and such activities as are essential to those purposes."

Moreover, the distinction is not between a business and a charitable corporation (which is specifically exempted),* but rather between one actively seeking to earn a living by commercial activity, and one realizing only an incidental "profit" by the sale of capital assets. The latter is not taxable. As stated in *Clallam Lumber Company v. United States*, 34 F. (2d) 944, 946 (W. D. Mich., 1927):

> "Doing business necessarily involves the pursuit of gain through commercial activity and should be distinguished from profit derived from the sale of capital assets, which results solely from enhanced market value."

And in *Union Land and Timber Co. v. United States*, 65 C. Cls. 129, 135, the court said of a realty corporation in the process of liquidation:

> "No business enterprise could discontinue advantageously without putting forth its best efforts to realize the greatest possible sum for its assets, and the mere fact that in the course of such proceeding profits may at times be realized * * * does not designate the transaction as 'doing business' within the intent of the taxing act."

It is clear from an application of these principles to the facts in this case that the Respondent was neither organized nor operated to seek a profit by commercial activity.

* Section 1201 (a) (1) of the Internal Revenue Code specifically exempts corporations which are exempt from the income tax.

It was found by the District Court that the Respondent was formed to take over assets, "to liquidate them in an orderly manner, and to distribute their avails." (R. 118), and this is all the Respondent did. The purpose never was to employ the assets to earn a current profit, but to get rid of them as quickly as possible. The stockholders knew from the beginning that they could not make a profit,* but hoped only to salvage what they could.

The Respondent did not have charter power, nor authority from the Interstate Commerce Commission, or the Maryland Public Service Commission, to operate its assets in the business to which they had been devoted before the railroad was dismantled. Once the railroad was broken up, and the rolling stock and equipment sold, the remaining scattered assets were inappropriate for use to carry on any recognizable business.

B. A Corporation Is Not "Carrying on or Doing Business" When It Is Not Employing its Assets for Gain by Commercial Activity Even Though it is Not Actually Liquidating.

Under the authorities, a corporation need not be actually winding up and selling off its assets to be excluded from taxation. It is not "doing business" if it merely holds property and does the necessary acts to maintain and service it.

In *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, the corporation was organized for the purpose of acquiring title to real estate. The only business done was to keep up the corporate organization, and to collect the rent received from its single lease and distribute it to stockholders—in much the same way as the Respondent handled rentals and proceeds from sales. The Supreme

* The Petitioner admits that the Respondent's stockholders will lose heavily (Petitioner's Brief, p. 22).

Court held that the mere receipt and distribution to its stockholders of rent was not doing business. In *Stafford Owners v. United States*, 69 C. Cls. 478, the corporation consistently performed the function of holding title to real property for which it was formed, but was held not taxable on the ground that it had not been organized or operated for profit. The resemblance of the two corporations in these cases to the present Respondent lies in the fact that they were both organized and operated merely as repositories for the legal title to real estate (R. 92-93), and as conduits of the income therefrom to its beneficial owners.

Two of the leading decisions of this Court on the subject of "doing business" held corporations not taxable which had been organized actively to manage and operate real property, which did so for a time but, prior to the taxable years, had reduced their activities to the mere holding of title and collection and distribution of income. In *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, a corporation was originally organized for and engaged in the business of letting stores and offices in a building owned by it. Subsequently it made a lease of all its property for 130 years at an annual rental of $61,000, and thereafter its activities were restricted to receiving and distributing the rentals, and to maintaining its corporate existence. It was held to have "practically gone out of business in connection with the property" upon the making of the lease and was, therefore, exempted from the capital stock tax.

McCoach v. Minehill & S. H. R. R. Co., 228 U. S. 295, is an even stronger case because of the extensive activities of the corporation which were held not "doing business". It had been actively engaged in constructing and operating a railroad for many years prior to the taxable period. It then leased its entire property to another railroad for 999

years at a yearly rental of $253,000, which represented 6% upon the lessor's capital stock. After the execution of the lease the corporation had no connection with the operation of the railroad properties. It did, however, maintain its corporate existence through legal formalities and retain officers, a Board of Managers and employees at its office. In addition to receiving the annual rental under the lease as well as interest on its bank deposits, it maintained a "contingent fund", the income from which amounted to $24,000 annually. The corporation collected the interest and dividends from said funds, invested the proceeds and made distributions among its stockholders of dividends. In holding the corporation tax-exempt, the Supreme Court established the following test—adopted by the court below in determining that the Respondent was not doing business (R. 126-7):

> "The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business; in which event the investment-income may be added to the business income in order to arrive at the measure of the tax, and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income and dividing it among its stockholders. In the former case the tax is payable; in the latter not." (228 U. S. at 308.)

In the *McCoach Case* this Court held that the profits realized, in spite of their size and the numerous activities necessary to produce them, were insufficient to constitute doing business because they "amount to no more than receiving the ordinary fruits that arise from the ownership of property." Clearly the Respondent's receipts, consisting of rentals and proceeds from sales of realty, were just this

and no more. It received no income from "outside property".

Cases involving corporations whose assets consist of securities are in point as presenting another specific application of the rule enunciated in the above cases: the owning of property and distribution of its avails, plus incidental maintenance activities, do not constitute doing business. This principle applies whether the property is realty or securities and whether the income is rent or dividends and interest. See *Eaton v. Phoenix Securities Co.*, 22 F. (2d) 497, 498 (C. C. A. 2).

A leading case of this type is *Rose v. Nunnally Investment Co.*, 22 F. (2d) 102 (C. C. A. 5), *certiorari* denied, 276 U. S. 628. There the corporation, having been engaged in the manufacture and sale of candy, sold its business to another company of the same name organized for the purpose. Thereafter the proceeds of the sale constituted the plaintiff's entire assets, part of which consisted of 40% of the stock of the purchasing company. The average value of the assets was $2,500,000 throughout the taxable years, during which it increased about 10%. Loans were made to stockholders of more than $1,000,000 and loans to nine employees of the operating subsidiary of from $2,000 to $6,000. These loans, represented by interest-bearing notes, were regularly increasing during the period. Moreover, several loans aggregating $8,000 were made to another corporation owned by one of the taxpayer's stockholders. At various times large amounts of cash totaling $400,000 were realized from maturing bonds, in addition to regular dividends and interest. The cash received, in excess of that on hand, advanced on loans, and paid out in regular semi-annual dividends of $50,000, was actually reinvested in securities—not distributed. The corporation was held not

to be doing business since it was not using its resources "to further business opportunity or standing". This Respondent has neither made nor received any loans, and has not reinvested the proceeds of its property (R. 118, 119), but has promptly distributed all net receipts to its stockholders. See also *United States v. Peabody Co.*, 104 F. (2d) 267, 270 (C. C. A. 6).

C. A Corporation is Not "Carrying on or Doing Business" When its Primary Function is to Liquidate its Assets and Distribute the Proceeds Among its Stockholders.

The District Court below found as a fact that the Respondent was organized to acquire the properties, "to liquidate them in an orderly manner, and to distribute their avails to its stockholders". (R. 118). It was formed, not to carry on a business, but to take title to the scattered remnants of an unsuccessful venture and bury the remains. As Mr. Griswold, the Secretary-Treasurer, testified (R. 94), it was an urgent liquidation:

> "The Company was very anxious to get rid of all its property as quickly as possible in the same way the Bondholders' Protective Committee had been doing. What we wanted to do was to sell and distribute and get out."

Of the cases involving corporations actually engaged in liquidation during the taxable years, there are five which involve striking similarities to the facts in Respondent's case. In *Johnson's Estate v. United States*, 37 F. Supp. 617 (Court of Claims), the corporation was formed in 1904 to acquire twenty acres of suburban real property from the executor of its former owner, who had devised it to his five sons. The consideration for this purchase was stock of the plaintiff corporation, which was ultimately distributed to them. For twenty-five years it carried out its broad charter powers to engage in a general real estate

development business by buying, improving, renting and selling large amounts of residental property. In 1929, however, the plaintiff adopted a policy of gradual liquidation, and a liquidating dividend was immediately distributed. Thereafter it discontinued many of its activities, ceased purchasing additional land, and generally reduced its operations to the maintenance of its remaining properties and the making of advantageous sales. It maintained an office force and grounds keepers, received rents, made repairs, advertised its holdings for sale, and undertook contracts with brokers and agents for their disposal. Although all its efforts during the taxable years 1934, 1935 and 1936 were directed toward ultimate liquidation, at the end of this period its assets were still valued at $2,300,000. In holding the corporation *not* liable for capital stock taxes, the Court of Claims applied the test established by this Court in *McCoach v. Minehill & S. H. R. R. Co.* (quoted *supra*, page 12), and concluded that:

> "If we apply the rule laid down above, it is clear that the plaintiff was not doing business in the period involved, as it made no investments and was not in receipt of income from what might be called outside property. Its only operations were in owning the property, maintaining the investments, collecting the income and dividing it among the stockholders."

If, the Court of Claims also said, a corporation is actually engaged in liquidating its assets, it is immaterial that market conditions make this a slow process where the stockholders are attempting to realize the best price therefor. It was conclusive that "only the holding, owning and selling of real estate remained, and the principal purpose was not profit but to liquidate the estate".

The opinion in the *Johnson Case* is therefore the broadest possible affirmation of the rule followed by the court be-

low, exempting from the capital stock tax a corporation in the process of liquidation. This is epitomized in the statement by the Court of Claims that:

> "The operations and transactions of the corporation were carried on merely for the purpose of reducing the property of the estate to a form in which it could be readily distributed among the heirs, and such activities, we think, do not constitute a business."

This Court in *United States v. Pyne*, 313 U. S. 127, a case involving income tax deductions, held that an executor engaged in the collection, management and distribution of corpus and income, was not "carrying on * * * business". The Court stated that the rule is not inflexible and explained that,

> "Rather obviously, there could be clear cases where executors 'carry on * * * business' by continuing to operate a store, a factory or some other well-known, well-marked type of business activity. But in the absence of evidence showing activity coming within the general acceptation of the concept of carrying on a trade or business, it cannot be said as a matter of law that an executor comes into this category *merely because he conserves the estate by marshalling and gathering the assets as a mere conduit for distribution.*" (Italics supplied.)

It is submitted that the function of an executor who administers the assets of a deceased person is almost identical with that of Respondent, which was created to administer the scattered assets of a dead business; and that the above language in the *Pyne Case* is equally applicable to the Respondent here.

In *Union Land & Timber Co. v. United States*, 65 C. Cls. 129, a corporation was organized in 1906 to engage in a general lumber business and the production of turpentine.

After having performed this function for a number of years, at the end of 1917 it decided to liquidate. Thereafter, all but one of its offices were discontinued, and it ceased all of its business activities except the effort to dispose of its holdings. It bought no more land, timber, securities or property of any kind, neither lent nor borrowed any money, and immediately distributed all proceeds from the sale of its assets to its sole stockholder, a parent company. During the taxable years 1918 to 1921, the corporation entertained competitive offers in attempting to dispose of its real estate holdings at the most favorable prices, and succeeded in selling 37 parcels, comprising a large portion of its assets, as well as considerable timber. Although its efforts to liquidate were intensive and long-continued, they were not immediately successful, as is illustrated by the fact that it retained a portion of its holdings when the suit was brought in 1928. Realizing the difficulty of selling at a fair price during the depression of the early 1920's, the company several times refused offers to purchase lands and turpentine rights, in the hope that better deals might later be made. In addition, it executed eight turpentine leases on its timber lands during the taxable years. In holding that these activities did not constitute doing business, the Court of Claims made the following significant statement at page 135:

> "We think this case comes squarely within the exception which exempts a liquidating corporation from the capital stock tax. The defendant predicates a contrary opinion upon the fact that at times offers for lands were refused, and negotiations continued to obtain more; that turpentine rights were sometimes let, and finally that the inherent nature of the plaintiff's business was of necessity the doing of the very things it did do—i. e., buy and sell land and turpentine rights, etc., for profit. The charter rights of the corporation disclosed its purposes, and among them was the pur-

chase and sale of lands and turpentine rights; but the continuance of these activities as a going concern, promoted for the purpose of paying dividends to its stockholders, and doing the same things to acquire sufficient funds to pay creditors are distinctly different. One contemplates the present and the future, looks toward an indefinite continuance of business activities. The other is predicated in this case largely upon the misfortunes of the past, and looks exclusively to a disposition to the best advantage of what the corporation has and discontinuing business."

Three revealing cases on this point, all entitled *Clallam Lumber Co. v. United States*, were decided by Judge Raymond in the Western District of Michigan in 1927, 1929, and 1940, and are reported in 34 F. (2d) 944, 34 F. (2d) 947, and 37 F. Supp. 542. The company was incorporated in 1910 with a capital stock of $2,100,000, of which $2,006,131 was paid in by conveyances of about 41,000 acres of timber lands formerly owned by the incorporators as individuals. Although the charter granted broad powers to engage in a general real estate and lumber business, "the prime reason for incorporating was to make it possible to sell the lands to greater advantage, their marketability having been affected adversely by the fact that the various individual holdings were interlaced with each other in such manner as to make the consummation of advantageous sales a matter of difficulty". During the twelve years intervening between incorporation and the taxable period involved in the first case (1922-3) the company had purchased several small parcels of land for various purposes, but with the ultimate purpose of thereby increasing the salability of the major holdings. In addition, 12,181 acres were sold to a lumber company for $2,000,000, the payments for which were to extend over the ten years from the end of 1921 to the end of 1931, including the taxable years 1922-3. Part

of the proceeds was always used to meet expenses, the remainder being distributed to stockholders. During the taxable period the plaintiff borrowed $15,000 from one of its stockholders; it employed an engineer to investigate the possibility of constructing a railroad from its lands to serve as an outlet for purchasers of timber, and granted options to purchase. The usual expenses were also incurred for fire protection, for the employment of counsel, and for administrative activities. The government contended that the company had "been engaged in a well recognized form of business activity, namely, that of speculating in timber lands, involving the purchase of such lands, the holding thereof until a satisfactory price is received, the protection of the timber from fire and trespass, and the ultimate sale thereof". The plaintiff maintained, on the other hand, that its activities "related merely to the ownership and preservation of its timber lands with the view of liquidating its capital assets and distributing the proceeds among its stockholders as soon as a fair price therefor could be obtained". In the first case, the District Court upheld the corporation on the ground that the activities were directed to the use of reasonable and proper means for carrying out the intention to liquidate the properties. The following statements appear at page 946:

> "Sales of capital assets for distribution of proceeds among stockholders deny the conclusion that the organization was maintained 'for the purpose of continued efforts in the pursuit of profit and gain'. *Doing business necessarily involves the pursuit of gain through commercial activity, and should be distinguished from profit derived from the sale of capital assets, which results solely from enhanced market value.* * * * In the cases in which liability has been sustained, there has been the element of use of capital assets to produce profit. * * * In those cases in which

the capital assets have been disposed of and the proceeds used for distribution among stockholders, it has been held that no such liability arose." (Italics supplied.)

The second *Clallam Case* involved the corporation's activities during the years 1924 and 1925. There had been two important additional activities during this period. First, a contract was made with another company for the construction and operation of a private logging railroad, the sole object being to make the timber salable by providing transportation facilities to tidewater. Approximately 18 miles of railroad were constructed, one-half of the cost being paid by the taxpayer from borrowed funds. It did not operate the railroad itself, but as a direct result of the latter's existence, all the timber lands had been sold by 1927. Second, a logging contract was entered into during 1924 for the sale of standing timber on 4,380 acres of land, which the vendee was to cut and remove. The proceeds were distributed to stockholders after the payment of expenses, and none were reinvested. The District Court held that these additional activities did not constitute doing business, saying, at page 948:

> "In each of the various cases in which the courts have held corporations subject to this tax, there appeared the obvious purpose of continuing the business indefinitely in the pursuit of profit. The companies were principally concerned with *profits*, not the *distribution of capital*, and were in some of the cases investing the gains. There is nothing in the activities of the Clallam Lumber Company to indicate 'continued efforts in the pursuit of profit', or an intent to indulge in such efforts. All activities of the company in the instant cases were calculated to bring about and were reasonably directed toward liquidation." (Italics the court's.)

As to the effect of the railroad construction and logging contracts, the court continued:

> "It seems, however, to be well established by the evidence that these activities were reasonably adapted for, and were in fact the only practical methods of carrying out the primary purpose of incorporating, namely, to liquidate and distribute capital assets."

In 1927 the Clallam company made three more contracts for the sale of standing timber. Subsequently it supervised logging operations to make certain that the maximum amount would be produced and employed field agents and surveyors to determine the quantity of timber available and to fix the price. This continued through the years 1936 and 1937, involved in the third case. During this taxable period the company sold a quantity of timber and agreed to modify its existing contracts by reducing certain prices and changing the type of surveys. It also paid certain executive salaries and direct expenses for field supervision. It collected small rents under an oil and gas lease and interest on Treasury Notes which it held as a reserve for contingencies. The District Court said that the company "was doing only those things appropriate to accomplish ultimate liquidation" and was not liable for the payment of the tax.

When compared, point by point, with the present case, these three involving the Clallam Lumber Co. appear strikingly similar. Both the Clallam Company and the Respondent were formed for the purpose of liquidating real estate. Neither corporation engaged in the pursuit of gain through commercial activity or the use of capital assets, but merely held its lands and effected sales when fair prices could be obtained. In both situations, proceeds were immediately distributed to stockholders after expenses had been met. Most of these expenses were substantially iden-

tical in both cases, since the liquidation of a railroad as well as that of a lumber company, requires the services of field agents, engineers, and attorneys. Moreover, the Government can point to nothing in the present case comparable to the capital expenditure made by the Clallam Company for the construction of a railroad or to the continuing activities necessitated by the logging contracts.

D. The Cases Cited By the Petitioner are Clearly Distinguishable.

The Respondent submits that there is no decision of any court in conflict with the decisions of the two lower courts in this case.

In all of the cases cited in the Petitioner's brief, where the tax was held to apply, the corporations involved were using their assets for the purpose of continued effort in the pursuit of gain, and were not liquidating. In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the corporations had never relinquished the active operation and management of their properties. This was true also in *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503. In the latter case the taxpayer, a mining corporation, had leased its holdings to others who were to carry on the actual mining operations, but it nevertheless maintained active supervision and control over the business. It exercised constant watch and care over the operations of the lessees, inspected the work in the mines as it proceeded, made explorations for ore, and employed agents to see that the mining operations were properly carried out, and that the lessees lived up to the agreements of their contracts. This Court held that these acts were all "done in the pursuit of profit and gain."

In *Edwards v. Chile Copper Co.*, 270 U. S. 452 the taxpayer was organized to finance a mining company, all of whose stock it acquired. It then authorized the issue of

collateral trust bonds for $100,000,000 secured by this stock, and from time to time advanced to the subsidiary large sums realized from their sale. Of the remaining proceeds, part were invested in Government bonds, but most were deposited with a bank which put the funds out on call loans. Over $332,000 was received in one year from the interest on these loans, entirely apart from the income on the Government bonds. The taxpayer also maintained an office with numerous employees and records and managed the subsidiary's affairs by voting its stock. It was held to be doing business solely because organized and operating for profit and because its affairs were integrated with those of its subsidiary which, under the laws of its domicile, could not have operated without the parent.

The cases in the lower courts cited by the Petitioner are also clearly distinguishable. In *United States v. Peabody Co.*, 104 F. 2d 267 (C. C. A. 6), the court held the corporation taxable because: "It is a going concern which has built up a large reserve available for profitable enterprise. It maintains its organization for a purpose which involves profits." That corporation had a surplus of over $2,100,000, which was increased during the taxable period by undistributed earnings, and a sinking fund of $100,000 created out of rentals and used in stock market operations. In *Harmar Coal Co. v. Heiner*, 34 F. (2d) 725 (C. C. A. 3), *certiorari* denied, 280 U. S. 610, the taxpayer was said to have been "organized for a definite though limited business purpose involving profits", and in *Argonaut Consolidated Mining Co. v. Anderson*, 52 F. (2d) 55 (C. C. A. 2), the court stated that "it did not distribute all its revenues in dividends, but in substantial part invested them in current securities which it bought and sold with an eye to their prospects of rise and fall. * * * It invested in a mining

property in Minnesota, not then, or ever since developed. These can be accounted for only on the assumption that it was looking about for speculative ventures. * * *"

Decisions of the Circuit Courts of Appeals in the first, second, fifth, seventh and ninth circuits, and of the Court of Claims, most of which are cited in the Treasury's brief, all gave as a reason for holding that the corporations there involved were subject to the tax, that the corporations as a question of fact, were not in liquidation. *American Investment Securities Co. v. United States*, 112 F. (2d) 231 (C. C. A. 1), is much like the *Chile Copper Case, supra*, in that it controlled and financed a large subsidiary and "at no time did it attempt to liquidate its affairs." (page 233). In *Page v. M. Rich & Bros. Co.*, 99 F. (2d) 607 (C. C. A. 5, *certiorari* denied, 306 U. S. 662, the decision was based upon "the greatly significant fact" that the corporation was engaged "not in liquidation, but as an active and going concern * * *", the court noting that: "For nearly ten years this Company has continued in existence, maintaining itself as a going corporation, undertaking no liquidation, undergoing none." In *New Haven Securities Co. v. Bitgood*, 87 F. (2d) 759 (C. C. A. 2), the court stated that the taxpayer was "not in liquidation" and could not "claim exemption as an inactive corporation, doing no more than liquidating its assets." Likewise, in *Lyon Lumber Co. v. Harrison*, 113 F. (2d) 443 (C. C. A. 7), the court made the revealing statement at page 447 that:

> "It chose not to quit, not to liquidate. So choosing, it remained in the list of corporations who were 'doing business'. Unhappily its business was neither large nor profitable, but considering the times it was 'doing business' as distinguished from 'liquidating' or 'closing up' its business."

And in *United States v. Hercules Mining Co.*, 119 F. (2d) 288 (C. C. A. 9), *certiorari* denied, No. 522, this Term, the court stated:

> "It had not undertaken and its stockholders did not appear to contemplate the liquidation of its assets or the winding up of its affairs; * * * In short, taxpayer was pursuing its corporate end of ultimate profit in the light of the particular circumstances which then confronted it."

The Court of Claims held that the taxpayer was taxable in *Chevrolet Motor Co. v. United States*, 64 C. Cls. 211, *certiorari* denied 277 U. S. 585, because "engaging in business activities inimical to the process of final liquidation."

Soon after the *Chevrolet Motor Co. Case* the Court of Claims decided the case of *Edgar Estates Corporation v. United States*, 65 C. Cls. 415, upon which the Petitioner so strongly relies. In that case sales were made during the taxable years, in some instances for cash and in others, part for cash and the balance in notes secured by purchase money mortgages. Not only was interest collected on the latter, but on at least three occasions the proceeds of sales, in the total amount of approximately $15,000, were invested in Federal and corporate bonds which were later sold at a profit. That case is distinguishable from the case at bar on the same grounds on which it was distinguished by the Court of Claims itself in the recent case of *Johnson's Estate v. United States*, 37 F. Supp. 617, 624, *supra*, namely:

> "In that case (*Edgar Estates Case*) it appeared that the plaintiff purchased and sold stock at a profit and it was held that considering all the activities of the corporation a degree of business activity was maintained within the meaning of the Revenue Law, although the amount of business done was small."

It is noteworthy that the court in *Johnson's Estate* did not distinguish the *Edgar Estates Case* on the ground that in the latter the corporation was carrying out the purpose of its organization, i. e., to liquidate assets, the ground principally relied upon by the Treasury in our case.

The Petitioner also relies upon the case of *Conhaim Holding Co. v. Willcuts*, 21 F. (2d) 91 (D. Minn.). The court in that case stated that the facts were almost identical with *Rose v. Nunnally Investment Co.*, 22 F. (2d) 102 (C. C. A. 5), *certiorari* denied, 276 U. S. 628, which had not then reached the Circuit Court of Appeals, and expressed "considerable doubt as to the correctness of that decision" by the District Court. The fact that the Circuit Court of Appeals for the Fifth Circuit subsequently affirmed the District Court in the *Rose Case* deprives the *Conhaim Case* of the little weight to which it otherwise might be entitled. In addition, the facts in that case show that numerous loans, for which the corporation charged interest, were made for the accommodation and benefit of stockholders and that "no distribution of assets or income has been made".

II.

THE TREASURY REGULATIONS.

A. The Regulations Interpreting the Statute Do Not Preclude Judicial Consideration of Their Validity.

The Treasury's brief makes much of the "validity" of Article 43(a)(5) of the regulations, which purports to characterize a liquidation as doing business. (We overlook for the moment the fact that there are two specific, applicable, and contradictory paragraphs of these regulations.) We believe that the test of validity of this, or any like regulation, is pragmatic, i. e., whether it can survive judicial scrutiny as to its reasonableness, correctness, and relevance. In other words, its validity is derivative from

judicial approval and not *vice versa*. There is no positive force in such a regulation which can oust the courts from independent consideration of the regulation as applied to an actual controversy. In a proper case there may be a *prima facie* persuasion which comes from the statistical probability that the impartial opinion of a rational man or agency is right instead of wrong. But here we have a very different situation: on the side of the Treasury there is its own self-serving broadside of general and illustrative regulations; on the side of the Respondent are considered decisions in similar cases by many courts, and a specific determination of this very case by the two courts below.

We do not suggest that this Court's present action is restricted by such former determinations, either of this very case or other similar cases (except, of course, as to the findings of fact by the District Court below). But surely there is here no presumption, or other fiction, to rescue the regulation, unless it commends itself on its merits.

B. The Two Paragraphs of the Regulations Which Apply to This Case Are Inconsistent and the Paragraph Relied on by the Petitioner Is In Conflict With Judicial Interpretation.

Actually, as we have above suggested, even if the total regulations were controlling, Respondent's case cannot stand or fall on Article 43(a)-(5) alone, which purports to define a liquidation as a taxable doing of business. The Treasury's brief is understandably silent as to Article 43(b) of the same regulations, which includes the following among corporate activities which are *not* taxable:

> "(2) the distribution of the avails of property and the doing only of such acts as may be necessary for the maintenance of its corporate status in the case in which the corporation either was organized for, or has reduced its activities to, the mere owning and holding of specific property."

The District Court found as a fact—in finding No. 5 (R. 118)—that Respondent was doing exactly and only what is declared in the above-quoted paragraph to be excluded from a taxable doing of business. On these facts the function of this Corporation must fall within both of these contradictory paragraphs of the same regulations. If there were any judicial disposition to follow tax regulations blindly, it would, therefore, be impossible in this case; a choice would still have to be made between the two inconsistent paragraphs. See *Estate of Sanford v. Commissioner*, 308 U. S. 39, 49; *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, 16, 20.

Furthermore, although we would not press for blind adherence to this Court's own prior decisions, it can at least be noted that the language of Article 43(b)(2) is lifted bodily out of this Court's decision in *Von Baumbach v. Sargent Land Co., supra*, at page 516. (Quoted at pages 8-9 of this brief.) The word "avails" used in that opinion and adopted in the regulation is given but one meaning in Webster's New International Dictionary (Second Edition, 1940): "Proceeds, as the avails of a sale by auction". We labor this definition to forestall any contention that Article 43(b)(2) is limited to the receipt of income from the mere holding of specific property and that it does not include sales thereof.

Article 43(b)(2) also disposes of the major argument of the Treasury that somehow the same activity might constitute doing business if the Corporation had been formed for that very purpose, but would not constitute doing business if such activity represented only a reduction of formerly greater activity. (Treasury brief, pp. 16-21.) The regulation says, "either was organized for, or has reduced its activities to . . .". Furthermore, this Court has held that the actual activity in the taxable year and not the charter

powers determines taxability. *United States v. Emery, Bird, Thayer Realty Co.*, 237 U. S. 28, 32. Even less felicitous is the Treasury's further suggestion that Respondent is doing business because organized under a state business corporation law. (Brief, p. 118, footnote 19). The fact of the matter is that even charitable corporations were and still are formed under the same sections of the same law, and in the same manner as Respondent was formed. (Article 23, Annotated Code of Maryland, Editions of 1924 and 1939.)

Because of the conflict within the regulations, and because of the further conflict between judicial interpretation and Treasury interpretation, it is neither necessary nor appropriate in this case to re-visit the battlefield of controversy over the effect of re-enactment following administrative or judicial interpretation of a statute. In our case the Congress, by its silent, and as far as can be known, unaware,* re-enactments would have swallowed two contradictory regulations, and a judicial interpretation conflicting with one of the regulations and in harmony with the other. Whatever vitality in the rule survives after *Helvering v. Hallock*, 309 U. S. 106, it is commonly regarded as a mere aid in statutory construction and comes down to a question of fact as to how far the Congress really did consciously consider and deliberately act, or fail to act, with reference to a judicial or administrative interpretation. Thus, even in *Sibbach v. Wilson & Co.*, 312 U. S. 1, where the Civil Rules which were there involved had been referred to the Congress in accordance with the statute and had been debated before Congressional Committees, four members of this Court agreed in dissent that, "to draw any inference of tacit approval by non-action by

* There are apparently no Committee Reports which indicate that the regulations were considered.

Congress is to appeal to unreality." See also *F. C. C. v. Columbia Broadcasting System*, 311 U. S. 132, 137.

But there are two reasons why the rule of re-enactment should not apply to this case, even if it still operates in full vigor in its appropriate sphere. In the first place, the paragraph of this regulation which would make Respondent liable for this tax does not have the authenticity of a responsible act of "concurrent interpretation". As the regulation itself states, Article 43(a)(5) is only one of a series of *illustrations*, by which the Treasury sought to stake out in advance its claim to revenue in almost every imaginable combination of circumstances other than those specifically exempted by statute. The illustrations in question smack of the grasping language commonly encountered in corporate mortgages, which frequently cover not only specific property, but add on for good measure "together with all other property of whatsoever kind and wheresoever situate, now owned or hereafter acquired by said mortgagor".

In the second place, the re-enactment doctrine cannot fairly be followed without independent judicial review in this and other cases where the *ex parte* ruling purports to be the basis of a later decision in the rulemaker's own favor in a *bona fide* controversy. Article 43(a)(5) should be treated here as no more binding than the arguments of the Treasury's learned counsel in their interesting brief; such arguments may persuade, but cannot pre-judge a case in which the Treasury is a party. See Paul, Studies in Federal Taxation, Third Series, "Use and Abuse of Tax Regulations"; e. g., page 434.

CONCLUSION.

In conclusion, it is clear that Respondent was not taxable unless the mere liquidation of assets constitutes "carrying on or doing business". The seasoned authorities in this and other courts uniformly hold that the taxable concept of doing business involves more—it involves regular and continued application of assets to the pursuit of earnings. We submit flatly that it is a contradiction in terms to speak of liquidating assets and of carrying on business with the same assets.

The question of taxability is determined by what is actually done by a corporation, whether that is all the charter permits, or is less than the charter permits, or whether it is less than was previously done.

The regulations are contradictory, but could not in any event enlarge the familiar concept of doing business.

We urge that the action of the two lower courts be affirmed.

Respectfully submitted,

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Counsel for the Respondent.

February, 1942.

APPENDIX.

Internal Revenue Code, Sections 1200 (a) and 1201 (a) (1), which sections contain provisions found in the Revenue Act of 1935, Sec. 105, 49 Stat. 1017; Revenue Act of 1936, Section 401, 49 Stat. 1733; and Revenue Act of 1938, Sec. 601, 52 Stat. 565, read as follows:

Sec. 1200. Tax—(a) *Domestic Corporations.*

For each year ending June 30, and beginning with the year ending June 30, 1939, there shall be imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * * *

Sec. 1201. *Exemptions.*

(a) The taxes imposed by section 1200 shall not apply—

(1) *Corporations exempt from income tax*

To any corporation enumerated in section 101;

* * * * * *

Treasury Regulations 64 (1936 Edition):

Art. 41. *Nature and Rate of Tax.*—The tax is an excise tax imposed with respect to carrying on or doing business during a taxable year ending June 30, or any fractional part thereof. It is an excise tax upon the exercise of the privilege of doing business and not on the business itself * * *.

Art. 42. *Doing business.*—The term "business" is very comprehensive and embraces whatever occupies the time, attention, or labor of men for profit. Accordingly, regardless of the nature of its activities, any corporation orgnaized for profit and carrying out the purpose of its organization is doing business within the meaning of the Act. Similarly, even if not organized

for profit, any corporation which nevertheless engages in activities ordinarily carried on for profit is also doing business. It is immaterial whether the activities result in a profit or a loss, whether the corporation has been successful in its enterprise, or that because of unfavorable business conditions, no operations are carried on for a particular period. No particular amount of business need be done, nor is it necessary that the business be continuous throughout the taxable year.

The case is exceptional in which the activities of a corporation organized for profit do not amount to doing business within the meaning of the Act. Such a case is generally limited to one in which the corporation is not pursuing the ends for which organized, i. e., profit.

Art. 43. *Illustrations.*—(a) *General.*—In general "doing business" includes any activities of a corporation whether it engages in—

(1) buying, selling, manufacturing, developing, financing, speculating or otherwise dealing in property of any description;

(2) furnishing services of any character;

(3) leasing or managing properties, collecting rents or royalties;

(4) managing, financing, controlling or directing the operations, performing any function, or, in any other way, aiding or serving the general purposes of any affiliated or related company;

(5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property; or

(6) any other activities coming within the ordinary and natural signification of the term "carrying on or doing business".

(b) *Exceptions.*—Ordinarily the exceptions to "doing business" are restricted to limited activities of a corporation, such as—

(1) the issuance and sale of its stock for cash as a preliminary step in the completion of its organization; or

(2) the distribution of the avails of property and the doing of such acts as may be necessary for the maintenance of its corporate status in the case in which the corporation either was organized for, or has reduced its activities to, the mere owning and holding of specific property.

Nor will a corporation be regarded as "doing business" if it has *no* activities, because it has—

(3) become dormant; or

(4) completed its business, as, for example, a real estate subdivision developed, sold and reduced to cash; or

(5) abandoned its business, as, for example, where prospective oil properties are proved worthless.

If the corporation's activities are not so limited as outlined in the preceding paragraph, it will be regarded as "doing business" within the meaning of the Act. Thus, a corporation is "doing business" if—

(A) in addition to the activities described in paragraph (b) (1) it engages in any other activity such as the making of contracts, the buying of materials or machinery, the construction of buildings, or the employing or discharging of individuals; or

(B) in addition to the activities described in paragraph (b) (2) it engages in any other activity, such as (i) in the case of a company holding securities, the investment or reinvestment of surplus or other funds in excess of an amount necessary to maintain its original investments, or (ii) in the case of a company which had leased its property to another, the maintaining or keeping the property in repair in accordance with the terms of the lease, or in other activities neces-

sary to enable the lessee properly to manage the leased property, regardless of whether such activities are performed on behalf and under the order of the lessee or that such acts are not of major importance; or

(C) although it retires from its principal business it nevertheless engages in other business activities or maintains its organization for the purpose of continued effort in the pursuit of profit or gain.

SUPREME COURT OF THE UNITED STATES.

No. 601.—October Term, 1941.

M. Hampton Magruder, Collector of Internal Revenue, Petitioner, *vs.* Washington, Baltimore and Annapolis Realty Corporation. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[April 13, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a suit for refund of capital stock taxes paid by respondent for the years ending June 30, 1936, through 1939. We are asked to determine whether respondent was "carrying on or doing business" within the meaning of § 105(a) of the Revenue Act of 1935, c. 829, 49 Stat. 1017, and subsequent acts, which provide:

"For each year ending June 30, beginning with the year ending June 30, 1936, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1.40 for each $1,000 of the adjusted declared value of its capital stock."[1]

Respondent was organized in 1935 with broad corporate powers under the laws of Maryland by the protective committee for the bondholders of the defunct Washington, Baltimore & Annapolis Railway Company. It was formed for the purpose of liquidating certain properties formerly belonging to the Railway Company which the committee had acquired through foreclosure. Among the properties received by respondent from the committee were certain rights of way, easements, terminal properties, and other real estate located in Baltimore, Annapolis, and Washington, as well as at the other points along the line of the railroad, and the stock of a realty holding company which owned another realty company, both of which had been subsidiaries of the Railway Company for the purpose of holding legal title to real estate. The value of

[1] This language has not been changed, except for the tax periods and the amount of the tax, in the subsequent acts covering the tax period here in question. See § 401, Revenue Act of 1936, c. 690, 49 Stat. 1733; § 601, Revenue Act of 1938, c. 289, 52 Stat. 565. The provision is now incorporated in § 1200(a) of the Internal Revenue Code.

the properties received in 1935, as shown by respondent's balance sheet, was $419,250.

Since its incorporation respondent has been carrying on negotiations for the sale of the properties acquired, selling them from time to time as satisfactory offers were received, and renting unsold properties under short term leases in an attempt to earn the carrying charges pending ultimate sale. Receipts from sales during the four year period here in question were approximately $675,000, and rentals amounted to $136,000. At the end of this period respondent's books still showed properties worth $122,000. All net income, except small reserves for contingencies, was distributed as received to the stockholders, former bondholders of the Railway Company.

Respondent paid capital stock taxes for the four years in question and then brought this suit for refund of the payments in the District Court. The court held that because respondent was a liquidating corporation, it was not "carrying on or doing business" within the meaning of the capital stock tax and was therefore exempt. In so holding the court refused to give effect to the Treasury regulation claimed to be applicable.[2] 35 F. Supp. 340. The Circuit Court of Appeals affirmed. 120 F. 2d 441. We granted certiorari because of the importance of the question in the administration of the revenue acts. 314 U. S. —.

The regulation, Article 43(a)(5), provides:

"ART. 43. *Illustrations.*—(a) *General.*—In general 'doing business' includes any activities of a corporation whether it engages in—

"(5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected—for example, the liquidation of an estate, or of properties taken over from another corporation, or of the shareholders' fractional interests in particular property;"

If the regulation is both applicable and valid, respondent manifestly cannot prevail.

On the question of applicability there can be no doubt for the language of the regulation precisely describes respondent's activities. We find without substance respondent's assertions that Ar-

[2] Article 43(a)(5) of Treasury Regulations 64 (1936 Edition).

ticle 43(b)(2)[3] is inconsistent with Article 43(a)(5) and that it more exactly fits the facts of this case. During the period in question respondent did not fall into that state of quietude, covered by the specific language of Article 43(b)(2), in which it was merely owning and holding specific property and distributing the resulting proceeds. See *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; cf. *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 516-17. On the contrary, respondent was actively engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtainable price.

Article 43(a)(5) is both a contemporary and a long standing administrative interpretation, having been in effect in substantially the same form since 1918, except for the period from 1926 to 1933 when the tax was not imposed.[4] We are of opinion that it is valid, as well as applicable. The crucial words of the statute, "carrying on or doing business", are not so easy of application to varying facts that they leave no room for administrative interpretation or elucidation. To be sure, in many, if not in most instances, the factual situation will be so extreme as to leave no doubt whether a corporation is doing business or not. But the nuances of facts between the two extremes have produced a nebulous field of confusion which has been recognized by courts striving to fit close cases into one category or the other.[5] Interpretative regulations, such as Article

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[3] "*Exceptions.*—Ordinarily the exceptions to 'doing business' are restricted to limited activities of a corporation, such as—

. . . . . .

"(2) the distribution of the avails of property and the doing only of such acts as may be necessary for the maintenance of its corporate status in the case in which the corporation either was organized for, or has reduced its activities to, the mere owning and holding of specific property."

[4] Article 5 of Treasury Regulations 38, issued under the Revenue Act of 1916, c. 463, 39 Stat. 756, provided:

". . . . A corporation formed to take over miscellaneous stocks, bonds, and other property, to negotiate the sale of the various items from time to time as opportunity and judgment dictate, and to distribute the proceeds from time to time as liquidation is effected, is organized for profit and while engaged in such liquidation is carrying on business."

This provision, with minor changes in wording, was continued in Treasury Regulations 50 (1919 ed.), Art. 18; (1920 ed.), Art. 11; Treasury Regulations 64 (1922 ed.), Art. 12; (1924 ed.), Art. 12; (1933 ed.), Art. 22; (1934 ed.), Art. 33. In 1936 Treasury Regulations 64 were reorganized and the substance of the provision quoted above was continued as Art. 43(a)(5) of the 1936 edition. No change was made in the 1938 edition.

[5] See Eaton v. Phoenix Securities Co., 22 F. 2d 497, 498; United States v. Hotchkiss Redwood Co., 25 F. 2d 958; Harmar Coal Co. v. Heiner, 34 F. 2d,

43(a)(5), are appropriate aids toward eliminating that confusion and uncertainty. Cf. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 102; *Textile Mills Securities Corp.* v. *Commissioner*, 314 U. S. —, No. 34, this Term.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

725, 727; Argonaut Consolidated Mining Co. v. Anderson, 52 F. 2d 55, 56; American Investment Securities Co. v. United States, 112 F. 2d 231, 232.

The decisions of this Court illustrate the difficult problems of classification encountered. See Cedar Street Co. v. Park Realty Co., 220 U. S. 107, 170; Von Baumbach v. Sargent Land Co., 242 U. S. 503; Edwards v. Chile Copper Co., 270 U. S. 452; Phillips v. International Salt Co., 274 U. S. 718—with which compare Zonne v. Minneapolis Syndicate, 220 U. S. 187; McCoach v. Minehill Railway Co., 228 U. S. 295; United States v. Emery, 237 U. S. 28.